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James D. Krol

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BREINER & BREINER, L.L.C.
115 NORTH HENRY STREET
ALEXANDRIA, VA 22314

EXAMINER

TRAN, LIEN THUY

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Please find below and/or attached an Office communication concerning this application or proceeding.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES D. KROL

Appeal 2011-002261
Application 10/692,857
Technology Center 1700

Before CHUNG K. PAK, LINDA M. GAUDETTE, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Appellant requests reconsideration of our Decision¹ affirming the Examiner's rejection of claims 11-15 and 22-36 under 35 U.S.C. §103(a) as unpatentable over the article of recipes for "Crustless Pizza" in view of the Google Groups disclosure (Request for Reconsideration ("Req.") filed Apr. 16, 2012).

We have considered Appellant's arguments, but determine the points allegedly misapprehended or overlooked by this Board panel were either fully addressed in our Decision, or not raised in the appeal briefs such that we now properly view them as having been waived, *see* 37 C.F.R. § 41.52(a)(1). We more fully address the arguments made with respect to each of the points raised by Appellant, in turn, below.

1. Independent claims 11 and 22, and dependent claims 12, 13, and 25:

Appellant contends this panel (a) overlooked the fact that "The Google Groups reference does not disclose 'a dry formulated flour mixture'" (Req. 3-4, 11, and 19), and (b) failed to identify evidence to support findings that one of ordinary skill in the art would have been motivated to use a "dry formulated flour mixture compris[ing] a high gluten flour and a double acting baking powder" (Req. 12 (discussing claim 12) and 19 (discussing claim 22)) in the specifically claimed amounts (Req. 13-14 (discussing claim 13)), and would have formulated a crustless pizza having a carbohydrate content as claimed (Req. 14 (discussing claim 35)).

With respect to point (a), Appellant contends "claim 11 requires a 'dry formulated flour mixture' . . . [which] is more than the flour of the Google Groups reference and is essential to making the base layer of the crustless pizza of the invention." (Req. 3.) This argument does not appear to have been made in Appellant's appeal brief. Accordingly, we need not consider it at this time as it is deemed to have been waived. *See* 37 C.F.R. § 41.37(c)(1)(vii). In any event,

¹ DECISION ON APPEAL ("Dec.") mailed Feb. 15, 2012.

Appellant has not identified, nor do we find, any basis in the Specification for limiting the phrase “dry formulated flour mixture” to anything other than dry ingredients which include, at a minimum, flour (*see, e.g.*, Spec. [00010]). *See Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1117 (Fed. Cir. 2004) (noting that it is improper to limit claim language to particular embodiments appearing in the Specification, unless the applicant has demonstrated a clear intention to limit the claim scope).

With respect to point (b), Appellant is directed to pages 8-9 of our Decision wherein the evidence relied on in support of these findings is identified.

2. Independent claims 11, 27, and 31:

Appellant maintains this panel (a) did not provide any basis for substituting “the Google Groups ‘a little flour and some whey Protein’ for the liquid mixture poured onto the cheese of the DEEP DISH PIZZA” (Req. 11; *see also* Req. 15) and (b) did not address the fact that the phrase “consisting essentially of” precludes any other ingredients that affect the basic and novel properties of the invention. (Req. 11-12, 16, and 18.)

With respect to point (a), Appellant is directed to pages 5-6 of the Answer which is cited on page 8 of our Decision and wherein support is provided for the proposed substitution.

Regarding point (b), Appellant has not explained why we erred in finding the Italian cheese layer of the DEEP DISH PIZZA recipe, as modified to include the Google Groups flour and whey Protein, meets the limitations of a base layer “of non-liquid ingredients consisting essentially of a dry formulated flour mixture and cheese” (claim 11) or “consisting essentially of flour and cheese” (claims 27 and 31). (*See* Dec. 6-7, and 8 (citing Ans. 5-6).)

3. Independent claims 27 and 31:

Appellants contend this panel overlooked the requirement of a base layer forming a “support layer.” (Req. 3-4, and 17.)

Appellant has not explained, with any degree of specificity, why the Italian cheese layer of the DEEP DISH PIZZA recipe, as modified to include the Google Groups flour and whey Protein, would not function as a support layer.

CONCLUSION

In conclusion, based on the foregoing, we have granted Appellant’s Request to the extent that we have reconsidered our Decision, but we deny Appellant’s request to make any change therein.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

DENIED

kmm